Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BOBBY GENE HUNTER,
Petitioner,

vs.

GLENN A. MUELLER, et al,

Respondent.

On Petition for Writ of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Ninth Circuit err in denying Petitioner's request for a Certificate of Appealability based upon the finding that Petitioner has made no substantial showing of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims despite the substantial nature of the issues presented by Petitioner for appeal?

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit, filed September 26, 2003, denied the Petitioner's request for a Certificate of Appealability. The Order appears in full in the Appendix A to this petition.

Petitioner sought a Certificate of Appealability in the Ninth Circuit after such a request was denied by the United States District Court for the Eastern District of California. The Civil Docket Report notes the Order denying the request for a Certificate of Appealability was filed May 23, 2003, and appears as Appendix B to this petition.

Petitioner sought a Certificate of Appealability to appeal the Order and Judgment of the United States District Court for the Eastern District adopting the Report and Recommendation of the Magistrate Judge and denying Petitioner's Writ of Habeas Corpus.

JURISDICTION

The United States Supreme Court has jurisdiction under Title 28 U.S.C. § 1254(1) to review denials of applications for Certificates of Appealability by a circuit judge or a panel of a court of appeals. Hohn v. United States, 118 S. Ct. 1969, 1978 (1998).

The Court of Appeals' Order denying the Petitioner's Request for a Certificate of Appealability was filed September 26, 2003. (see Appendix A).

Petitioner files the instant petition within ninety (90) days from the filing date of the Order of denial of the request for a certificate of appealability and this petition is therefore

within the jurisdictional time limit imposed under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This case primarily involves statute 28 U.S.C. § 2253 controlling the issuance of a Certificate of Appealability, specifically section (c)(2) which states that "a certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

This petition for a writ of certiorari also implicates 28 U.S.C. § 2254, controlling an application for a writ of habeas corpus.

STATEMENT OF THE CASE

After fully exhausting his state court remedies, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of California on August 9, 1999, asserting that his conviction violated his constitutional rights on numerous grounds. The United States District Court for the Eastern District denied the petition on the merits by Order filed March 18, 2003. Petitioner filed a Request for Certificate of Appealability on April 4, 2003, as to each of the constitutional claims raised in the Petition. The Eastern District Court denied the request by Order on May 23, 2003.

This is a petition from the judgment of the United States Court of Appeals for the Ninth Circuit, entered September 26, 2003, in which the Court denied petitioner's Request for a Certificate of Appealability to challenge the

dismissal of his petition by the United States District Court for the Eastern District of California.

Upon denial and dismissal of his petition in the Eastern District, petitioner brought a Request for a Certificate of Appealability on grounds that he had made a substantial showing that dismissal of his federal petition and denial of his request for a certificate is in violation of a positional right. Petitioner claimed he was deprived of due process at various stages of his trial and the denial of federal review of the merits of his claims constitutes a deprivation of his constitutional right to due process.

As "an applicant may request that a circuit judge grant the certificate after a district judge has denied it," (See Nevius v. Sumner, 105 F.3d 453, 458 (9th Cir. 1996)), Petitioner then brought a request for a Certificate of Appealability in the Ninth Circuit Court of Appeals. The Ninth Circuit similarly denied the request and referenced 28 U.S.C. § 2253(c)(2) addressing the substantial showing requirement.

Petitioner herein brings this Petition for Writ of Certiorari on the issue of whether the United States Court of Appeals erred in denying Petitioner's Request for a Certificate of Appealability as Petitioner asserts his Petition for Writ of Habeas Corpus in the Eastern District Court satisfied the substantial showing required of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims.

STATEMENT OF THE FACTS

Petitioner submits that his Due Process rights were violated because his plea was not made knowingly, voluntarily or intelligently.

Petitioner submits that his Sixth Amendment right to counsel was violated because he was denied effective assistance of counsel.

Petitioner submits that his right to counsel was violated when he was never fully informed of the consequences of his plea.

Petitioner submits that right to effective assistance of appellate counsel was violated.

REASON FOR REVERSING THE DECISION OF THE LOWER COURT

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DENYING PETITIONER'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED.

The 6th Amendment to the Constitution of the United States ensures the right in all criminal prosecutions to public trial by an impartial jury; to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. These rights shall not be construed to deny other certain rights retained by the people. As stated in the 9th and 14th Amendments to the Constitution of the United States, these rights belong to the petitioner. A state may not make or enforce any law which abridges these privileges. An unknowing written waiver may not be construed to deny other certain rights such as the due process right to equal protection. For example, "had the court asked counsel whether he had advised the defendant of his right of confrontation and asked the defendant whether he waived that right, receiving an affirmative reply to *both* inquiries, this would satisfy the requirement of an express on the record waiver for that right." People v. Evanson (1968) 265 Cal.App.2d 698.

There is no advisement or waiver of these federal constitutional rights in the colloquy between petitioner and

the judge. Second degree murder is within a definition requiring malice aforethought. In court on October 14, 1993, The Court presumed that petitioner was advised of the charges. Counsel waived further reading of the complaint and advisement of constitutional rights.

The information filed October 21, 1993, states: On or about August 8, 1993, in the County of Butte, State of California, the crime of murder, a felony was committed by Bobby Gene Hunter, who did willfully, unlawfully, and with malice aforethought murder Josephine May Schain. Prior to accepting the plea this information was not read, petitioner never saw this. Counsel never reviewed this information with petitioner or gave him a copy of this information. At arraignment in municipal court petitioner was told he was charged with murder, the elements were not stated. The information was amended to second degree murder on Dec. 1, 1993, again the elements of the crime were not stated, and the only change is a penned in notation that this is second degree.

Petitioner plead not guilty to murder, would not have plead no contest to second degree murder had he known it stated he intended to kill the victim.

On July 14, 1997 at the evidentiary hearing the DA stated, "the defendants main disagreement with the process doesn't really apply here because he's saying he plead to second degree murder but he did not intend to kill the victim. Therefore he should be allowed to withdraw his plea...but second degree murder doesn't require the intent to kill, and voluntary manslaughter does, under that basis if you believe everything that he is saying, is consistent with going ahead and pleading to second degree murder. Because it doesn't require an intent to kill, on that basis counsel would not have

been ineffective.' And the defendant had the burden in this writ to show that he didn't know what he was doing because of his depression, combined with the use of Elavil, and that he basically had been forced to plead. Petitioner was not advised of his right to withdraw this plea. The Third District Court found there was no advisement given pursuant to Penal Code 1192.5. Petitioner didn't know that the court's acceptance of the plea was conditional. Bunnell error was committed but the court's opinion was that he waived his right to show it by not objecting, even though the court never addressed him at sentencing.

The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. When the act causing the death, though unlawful, is done [in the heat of passion] or is excited by [a sudden quarrel such as amounts to adequate provocation] the offense is manslaughter. In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder is absent. To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel]. (CALJIC 8.50) This does not require intent to kill, it only states that even if an intent to kill exist, it is reduced because there is no malice. Even if implied malice could be shown, the fact that the act was done in the heat of passion upon a sudden quarrel would negate malice. Additionally, If you find that a defendant, while unconscious as a result of voluntary intoxication, killed another human being without intent to kill and without malice aforethought, the crime is involuntary manslaughter. When a person voluntarily induces [his] own intoxication to

the point of unconsciousness, [he] assumes the risk that while unconscious [he] will commit acts inherently dangerous to human life or safety. Under such circumstances, the law implies criminal negligence. (CALJIC 8.47) If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder. People v. Dewberry, (1959) 51 C.2d 548, 556-557, 334 P.2d 852, 857- 858. People v. Aikin, (1971) 19 C.A.3d 685, 699-705, 97 Cal.Rptr. 251, 261-265. (CALJIC 8.72) Petitioner would not have plead 'no contest' to second degree murder had he been advised that he was saying he willfully, with malice aforethought killed Josephine May Schain.

Additionally, Petitioner was not competent to enter the plea of no contest. The need for full understanding in entering a no contest plea is underscored by the rule with respect to withdrawing a plea, which allows a defendant to withdraw his plea for mistake, ignorance or inadvertence or any other factor overreaching defendants free and clear judgment. Johnson, supra, 35 Cal.App. 4th p.1357, citing People v. Superior Court, (Giron,(1974) 11 Cal. 3d.793, 797.)

We then consider whether the record in this case affirmatively shows that defendant's colloquy constituted a knowing and voluntary waiver of Constitutional rights. The evidence of petitioner's mental and emotional instability prior to the taking of the plea, and the quick litany of yes's and no's while under the influence of elavil did not meet the standards for establishing a voluntary, knowing, and intelligent waiver of Constitutional rights. United States v. Cochran, (9th Cir.1985) 770 F.2d 850, 851, 853. "Both colloquies were

very brief, and in both, the defendant's contribution consisted only of two or three 'yes' answers."

The Judge could not discern petitioner's understanding of his constitutional rights from the colloquy above since they are never mentioned. In U.S. v. Christensen 18 F.3d 822 (9th Cir. 1994), the colloquy complained of was more extensive than that of petitioner's. Christensen was told that he had the right to have twelve jurors, all of whom must find him guilty. Christensen replied that he understood that, and waived jury trial. In Petitioner's colloquy there were no clear concise questions as demonstrated in Christensen. All the questions asked by the Trial court, required only a Yes or No answer. The only actual sentence was an incorrect answer. Petitioner only completed the eighth grade, not the tenth. The medical records show that petitioner was under the influence of elavil, an anti-psychotic drug.

A Waiver by counsel is not sufficient; a fortiori, having been advised by counsel is not sufficient. (In Re Tahl, (1969) 1 C.3d 122 at p.131, 132; 81 Cal.Rptr. 577, citing People v. Holms, (1960) supra, 54 Cal. 2d. 442; cf.)

A 1203.03 diagnostic evaluation was noted in the plea agreement listed under "other possible consequences of this plea." Petitioner believed this evaluation was to happen before he was sentenced and sent to prison.

Boykin necessitates a more precise showing on all phases of a guilty plea than mere inferences however plausibly drawn from the circumstances on the record. California law would seem to require some express courtroom statement by the accused and to preclude waiver by even the most redoubtable inference from the record.

Thus we reach the second possible interpretation of Boykin: that each of the three rights mentioned self-incrimination, confrontation, and jury trial must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea. This means that the record must contain on its face direct evidence that the accused was aware, or made aware. There is no evidence on the record to show that petitioner was aware of the substantive rights enumerated in Boykin.

Due process requires a court to conduct a competency hearing on its own motion, before permitting a defendant to waive constitutional rights when a reasonable doubt is present. United States v. Lewis, 991 F.2d 524, 527 (9th Cir.1993).

At the evidentiary hearing held July 3, 1997 the trial judge placed the burden of proof on petitioner to show that he was not competent to enter a plea. This post-conviction hearing was constitutionally inadequate to cure the state's initial failure to hold a competency hearing. It is clear that a violation of this right can only be cured by a post-conviction hearing in which the state bears the burden of proving that the defendant was competent to stand trial. In other words, the state must bear the burden of retrospectively proving competence if the trial court failed to provide the defendant with the constitutionally required competency hearing.

In the hearing transcripts on page 22, the Doctor stated that a 1368 evaluation was requested. Counsel states he never spoke to the Doctor. On pg. 26, the Doctor says he didn't do a formal 1368 evaluation, that it was never requested. On pages 67, 69 and 70, he states he wasn't aware that petitioner was suicidal, he would have done an evaluation had he known. He also stated that he did no evaluation after prescribing the elavil, that he spent five

minutes after initially seeing petitioner. He said he had no memory of him and did no evaluation before or after the medication was prescribed. Dr. Fithian is an experienced, medical doctor and should have known that the medication must be decreased to the lowest effective dosage.

Petitioner's counsel offered no reason why he failed to confer with the jail doctor. He stated he knew of the medication "early on", then he states he may not of known about the medication until he read the probation report.

Whether or not an evaluation was requested it is clear that there was reason to have requested the formal evaluation or independent examination.

[1] Trial court was required to hold a sua sponte hearing under Pate violation in failure to hold a contemporaneous hearing to determine competence, post conviction hearing was inadequate. It is therefore essential, that there be evidence the plea was voluntary and knowing.

Pate v. Robinson 383 U.S. 375, 86 S.Ct. 836. Suggestive evidence includes defendant's demeanor before the Trial court, previous behavior and available medical evaluations. Drope v. Missouri 420 U.S. 162,180 [95 S.Ct. 896,908] 43 L.Ed.2d 103 (1975); Lewis 991 F. 2d 527. In Pate the Supreme Court found that after six years there was insufficient evidence to make the required competency determination. The Court reversed the conviction and remanded for a new trial; thus the Court established that the burden of proving a defendant's competence in a retrospective determination is on the state. This precedent has been consistently followed by the Supreme Court, see e.g., Drope v.

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[1] Medical authorities do indicate that anti-psychotic drugs affect different subjects in different ways and may result in the subject becoming mentally confused.

Missouri, 420 U.S. 162, 183. 95 S.Ct. 896, 909, 43 L.Ed.2d 103 (1975) (reversing for new trial after finding that remand for psychiatric evaluation to determine whether defendant was competent to stand trial six years ago was not a proper remedy), and has frequently been applied by this circuit.

In every case where our court or the Supreme Court has addressed the sufficiency of the evidence for making a retrospective determination, we have affirmed the view that the state bears the burden of proving competence. Mr. Reilley stated on July 14, 1997 at the closing of the evidence, that the defendant had the burden in this writ to show that he didn't know what he was doing because of his depression, combined with the use of Elavil, and that he had basically been forced to plead.

"Once the petitioner has established [that the trial court should sua sponte have held a competency hearing].... he or she has made out a federal constitutional violation. At this point, the state has the opportunity to establish before the federal district court the petitioner's competency at the time of trial." Drope, Supra.

In Petitioner's case it would have been meaningful at the time prior to entering the plea to conduct a hearing to determine the actual effect of the drug that petitioner had been taking, on his ability to meaningfully participate in trial decisions. In contrast at the evidentiary hearing the only evidence of the actual effect of the drugs was Petitioner's testimony. Dr. Fithian, failed to monitor the effects of the drug and never did an evaluation to determine petitioner's competence while under the influence of elavil. Elavil, at this dose only produced a feeling of being drugged, did not

produce clarity of mind. [2]The usual maintenance dosage of amitriptyline is 50mg to 100mg per day. Over 150mg requires hospitalization. In order for a no contest plea to be constitutionally valid, it must be shown that the defendant entered his plea knowingly, intelligently, and must be made voluntarily.

(Boykin v. Alabama, (1969) 395 U.S. 238.) The test to determine the validity of a no contest plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
There must be both the capacity to make an understanding choice and the absence of subverting factors so that the choice is clearly free and responsible. Von Moltke v. Gillies, (1948) 332 U.S. 708, 729,92 L. Ed.309 (Frankfurter, J., concurring.)

In order to make this voluntary and intelligent choice the defendant must be free from the influences of drugs that cloud his ability to make a rational choice. Where there is evidence that a criminal defendant is under the influence of some drug or medication that could preclude him from understanding the nature of the proceedings against him, the trial court must make a diligent and detailed examination of the voluntariness of the defendant's plea. There was evidence in the probation report that petitioner was under the influence of drugs and unstable.

Therefore, Petitioner asserts that the Ninth Circuit erred in denying Petitioner's claim that he was never fully aware of the consequences of his plea of no contest due to the high dosage of medication Petitioner was on. As such,

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[2] References: Amitriptyline by Mosby Inc. (copyright 1998). Guide to prescription drugs, Dr. Thomas Long, (1998); Physicians reference (1999)

Petitioner's plea must be withdrawn as it was taken in violation of his constitutional rights.

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DENYING PETITIONER'S CLAIM THAT PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

(1). Trial counsel failed to communicate with Petitioner throughout his court proceedings.

(a). Counsel did not investigate his client's mental state, did not argue for a diagnostic evaluation after indicating one would be done.

Counsel indicated in the felony plea form that a diagnostic evaluation may be requested pursuant to California Penal Code Section 1203.03. Counsel never even requested much less argued that this should be done. People v. Myers, (1984) 157Cal.App.3d. 1162; People v. Harris; (1977) 73 Cal.App.3d 76; People v. Nelson, (1967) 257 CalApp.2d 282; People v. Peace, (1980) 107 Cal.App.3d 996.

Petitioner was placed on suicide precautions twice, single celled and stripped of his clothes. Mary Lou Snodgrass had 18 counseling sessions with petitioner for periods ranging from 1½ to 2½ hours. She testified that petitioner had major depression. She conferred with Dr. Podel, head of

Step II Psychological Services, EED, a board certified Psychologist. Ms. Snodgrass observed that petitioner suffered major depression September 1993, through January of 1994, when she last saw him.

Ms. Snodgrass testified about petitioner's mental state at the evidentiary hearing. He wasn't eating or sleeping, showed signs of agitation, irritability, was hopeless and exhibited helplessness in not wanting to help himself. "I know I mentioned earlier about his fingernails. I am not sure I went into the details. I have never seen fingers like that. They were down to blood. He picked them down to where there was no fingernail left.

There was no nail left, and skin had come up over where the nails had been. His fingers hadn't healed when I had seen him the last time in January." Finding additional facts in the testimony of Ms. Snodgrass, stating the petitioner was unable to maintain his integrity as far as wanting to live, had difficulty concentrating and wasn't communicating, wanted to be punished, was punishing himself. She testified that "Bobby Hunter was clinically depressed, he was suicidal, he had thoughts that were in the extremes, his mood fluctuated from hopelessness to, I am just going to die, I shouldn't live; believing that he was an animal, that he should just—just didn't have a right to be here, and then fluctuating back to what was he going to do and how could he live with this and how could he move on."

Any time evidence appears which raises a sufficient doubt about the acussed's mental competency the court must order a competency hearing. Speedy v. Wyrick, 702 F. 2d 723, 727 (8th Cir. 1983). Counsel stated he appeared with petitioner in court on 8-19-93, but when the transcripts were obtained he had another attorney appear for him, never even

requested bail. Counsel repeatedly stated when asked direct questions "it is my practice." Petitioner asserts that the outcome of his case would have been different had trial counsel acted diligently and requested a competency hearing. Petitioner was under the influence of high doses of medication and this medication put Petitioner in a state of mind which did not allow him to make rational choices. Petitioner asserts that, had trial counsel conducted a competency investigation, the outcome of his case would have been different.

(b). The consequences of petitioner's plea were not mentioned until the end of sentencing.

The plea agreement stated Petitioner would be on parole 36 months. The mention of lifetime parole was very brief, at the end of Sentencing. Brown v. Doe, 3 F.3d 1236 (2nd Cir. 1993). The plea bargaining stage is critical, during which advice of counsel is essential.

"Plea bargaining, in other words, though a matter of criminal jurisprudence, is subject to contract-law standard. Therefore, the terms of the agreement, if disputed, are to be determined by objective standards." United States v. Arnett, 628F.2d 1162,1164 (9th Cir.1979); see also United States v. Fernandez, 960 F.2d 771,772 (9thCir.1992). (Hill v. Lockhart (1985) 474 U.S. 52, 55-56.) This is an issue of the length of parole and terms stated in the felony plea form which conflict with the actual sentence imposed.

The Boykin-Tahl-Bunnell requirement of advisement as to sentencing range and other direct consequences of the plea show sufficient prejudice to warrant reversal. The Third District Court of Appeal stated that Bunnell error had

occurred. (People v. Hunter, 3 Crim. C017582 (Ex. B2). The Court states, "The 36-month parole period was included in the plea form as part of the preprinted terms. It was obviously inappropriate for this case. The court did not mention the parole period in reciting the terms of the plea. Since lifetime parole is mandatory for second degree murder, the length of parole is not a proper subject for negotiation."

Evidence that petitioner was advised of the length of parole was not established outside the plea form, which the judge, the district attorney and the defendant's counsel signed. It was not stated on the record, a signed agreement was the only source. Where petitioner's constitutional rights were not waived on the record and were contained in the plea form, there is a question of ambiguity. In viewing the totality of the record, the court seems to imply that on one hand, he was advised by the written plea form and on the other, that the plea form was "obviously inappropriate." The record after sentencing simply states that, parole will be life. Length of parole is a consequence of this plea and lifetime as opposed to 36-months is not harmless error where there is no instruction.

The question of an effective waiver of a federal constitutional right is governed by federal standards. Boykin v. Alabama, supra, 395 U.S. at 243...A guilty plea, which works as a waiver of numerous constitutional rights, cannot be truly voluntary if the defendant 'has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Henderson v. Morgan, 426 U.S. 637, 645 n. 13...(1976) Accord, Smith v. O'Grady, 312 U.S. 329, 334 (1941). Petitioner had no understanding of the guilt he was asked to admit. In entering a guilty plea one must recite what was done but since this was a no contest plea his understanding of second-degree murder was never canvassed.

(c). If a criminal defendant is prejudiced by his attorney's errors, he must be given the opportunity to withdraw his plea. (Id. at p. 1355.) People v. Johnson (1995) 35 Cal.App. 4th 1351.)

In Johnson's declaration accompanying his writ of habeas corpus, he stated that had he been correctly advised of his maximum potential sentence of 27 years, he would never have accepted the plea bargained 20 year sentence. In permitting Mr. Johnson to withdraw his no contest plea, the Johnson court stated that: Where a defendant has been denied the effective assistance of counsel in entering a plea of guilty, he is entitled to reversal and opportunity to withdraw his plea if he so desires. Johnson, supra, citing People v. McCray (1985) 166 Cal. App.; 3d 1, 7.) To be valid, guilty pleas must be based upon the defendant's full awareness of the relevant circumstances and the likely consequences of his action. Johnson, supra, citing People v. Hunt (1985) 174 Cal.App. 3d 95, 104.)

Petitioner's situation is closely analogous to Mr. Johnson's. Petitioner would have accepted the offer of voluntary manslaughter and received a sentence of three, six, or eleven years. There is a significant difference in fifteen years to life and even the high term of eleven years. Petitioner would not have agreed to a stipulation for the factual basis or entered a plea of no contest, had he known the plea meant that he intended with malice aforethought to kill the victim.

Like Mr. Johnson, petitioner entered his plea as a result of misunderstanding the fundamental facts surrounding his case. More important is the fact that petitioner would have gone to trial, he did not state he was guilty. A no contest plea, admits no guilt, to be found guilty of murder one must admit

guilt. There must be an understanding of the charges and of the consequences.

Normally the record contains an explanation of the charge by the trial judge or at least a representation that the nature of the offense has been explained to the accused. Henderson v. Morgan, (1976) 426 U.S. 637 Id. at 647. Counsel had stated that on December 1, 1993 before the signing of the felony plea form he did not advise petitioner of malice aforethought or intent to kill as an element of second degree murder.

Counsel sought advice from another [3]attorney and a letter was received September 13, 1993. This advises, "heat of passion may be shown by the facts and circumstances leading up to the killing". Even though counsel sought advice, he never acted on the advice he received which clearly stated; Evidence of voluntary intoxication may be shown to negate malice and any other element of murder. The defendant's counsel may present expert testimony on voluntary intoxication. Counsel never sought any expert opinion or investigated this defense. He was advised that if the victim provoked the defendant, alternating between acceptance and rejection, being sexually intimate with him, these incitements could tend to show he acted because of a sudden and uncontrollable rage. He then states that the conduct of the victim had to be such as to cause him to act rashly from this passion.

(People v. Berry (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 418].) "The key element is not the duration or the source of provocation but whether or not defendant's

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[3] Jack D. Wood Attorney at law, Paradise, Ca. Ex. S3

reason was, at the time of his act, so disturbed or obscured by some passion, to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and act from this passion rather than judgment." Petitioner "immediately opened the door for the police, gave no resistance, was very polite to the officers." This is not the behavior of someone that knows he is guilty, or knows he did wrong.

(People v. Wharton (1991) 53 Cal.3d 522, 570, [280 Cal.Rptr. 631,660].) There is no specific emotion that alone would constitute the heat of passion. Witness Rowe stated that they had been intimate for the past month and that he had been with her that evening. He also knew that petitioner lived with the victim and they had an ongoing relationship. He stated that when they had an argument two weeks prior the victim had called him and stayed the night at his house without petitioner's knowledge.

(d). Counsel dismissed all possible defenses after stating he was developing grounds to show this was involuntary manslaughter.

In re Saunders, 2 Cal.3d 1042,1049; People v. Ibarra, 60 Cal. 2d 460; In re Williams, 1 Cal.3d at p.177). People v. Wax, 387 U.S.930; 18 L.Ed 2d 991, 40 AMJur 2d section 58 p.352, In the determination of whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances are to be taken into consideration. The instrument or weapon whether deadly or otherwise along with the slayers mental state. This is not to be determined solely from what takes place at the time of the killing, the previous relationship is to be considered.

Petitioner told counsel through the course of this proceeding that he never intended to kill or harm the victim, and he used no weapon.

In People v. Bridgehouse, 47 C2d 406 (1956) evidence that defendant was a man of excellent character; that he was mentally and emotionally exhausted was used to show only voluntary manslaughter. As in Bridgehouse, petitioner had a good reputation and was known as a hard worker. There were ten statements out of ten people that knew him declaring they had never seen him mad, never knew him to be violent. That he never drank to the point of being drunk.

Mullancy v. Wilbur, (1975) 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508, due process requires that in a homicide case the prosecution must prove beyond a reasonable doubt the absence of heat of passion. An intentional killing is manslaughter when it is committed under the influence of passion caused by provocation People v. Valentine, 28 Cal 2d 121, People v. Danielly, 33 Cal 2d 362, People v. Kelly, 208 Cal. 387,393.

Penal Code 187; if the defendant commits an act which endangers human life without realizing the risk involved, he is guilty of manslaughter. People v. Holt, 25 Cal 2d 59, People v. Cleaves, (App. 4th Dist.1991) 280 Cal.Rptr.146, 229 Cal.App.3d 367. Teague v. Lane, (1989.) 489 US.288, 103 L.Ed.2d. 334, 109 S.Ct 1060. People v. Wells, 149 Cal App 3d 497, Defines error which compels reversal of conviction. "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." United States v. Gaudin, 115 S.Ct.

2310, 2320 (1995), In Re Winship, 397 U.S. 358, 364 (1970). Edge v. Wainwright 347 F.2d 190, (16 ALR 3d.1030.)

Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989): Petitioner's counsel showed prejudice in not investigating information already in police reports. Integral to this analysis of prejudice is that counsel withdrew the defense that could negate intent: voluntary intoxication and heat of passion. See e.g., People v. Cameron, Supra.

Penal Code section 187, subdivision (a) defines second degree murder, in pertinent part, as the unlawful killing of a human being ...with malice aforethought. The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation or reflection, and from such passion rather than judgment.

All degrees of murder in the State of California are specific intent crimes, regardless of whether willful, deliberate, and premeditated Penal Code section 189. Moreover, as a specific intent crime, a charge of implied malice murder may be reduced to manslaughter when evidence of voluntary intoxication shows that the defendant did not actually harbor Malice aforethought. People v. Whitfield, (1994) 7 Cal.4th 437, 447, 27 Cal. Rptr.2d 858).

The DA made the formal offer on October 28, counsel failed to communicate this to his client and quit trying to defend his client prior to the trial ready conference. In re Johnson, (1965) 62 C. 2d 325,330;42 Cal. Rptr. 228, There is a presumption, of course, that in preparing this docket entry official duty was regularly performed (Code Civ. Proc., 1963, subd. 15), and on collateral attack such an entry must

ordinarily be deemed to speak the truth. [4] Even if true, however, the entry in the docket does not state how, when or in what manner . . . the defendant was informed of his constitutional rights (In re Newbern, (1959) 168 Cal.App. 2d 472, 476 [4a] [335 P 948]), nor does it specify which of his various rights were thus made known to him. Here, as in Newbern, the constitutional rights of the petitioner being involved we may look to the entire record to ascertain the meaning of the entry.

Petitioner retained Attorney Jodea Foster to begin a writ of habeas corpus July 3, 1995. Mr. Foster visited petitioner on January 19, 1996 at SCC State Prison at Jamestown, to discuss the facts surrounding his conviction for second degree murder. Petitioner told him that he had always maintained to Mr. Battle that he never intended to harm anyone, that Mr. Battle had never explained the degrees of murder or the elements of intent.

Here Counsels omissions were prejudicial and adversely affected petitioner's ability to knowingly, intelligently and voluntarily enter a plea of no contest. Johnson, supra, citing People v. McCray,(1985) 166 Cal.App.3d p.10.

In order to obtain relief for ineffective assistance of counsel, the burden is on the petitioner to establish that, counsel failed to act in a manner expected of a reasonably competent attorney acting as diligent advocates...[and] that counsels acts or omissions resulted in the withdrawal of a potentially meritorious defense. People v. Pope (1979) 23 Cal. 3d 412, 42. Strickland v. Washington, (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

In Hill v. Lockhart, (1985) 474 U.S. 52, 58, 106 S.Ct. 366, 369, 88 L.Ed2d 203, The United States Supreme Court

held that Strickland, supra, petitioner alleging ineffective assistance of counsel must show counsel's performance was deficient and resulted in prejudice. Furthermore,...there is a reasonable probability that, but for counsels errors, he would have insisted on going to trial. Counsel stated he had a report that showed the number of blows differed, as well as the use open hand and not a fist. Petitioner was not made aware that evidence. This was neither a tactical or strategic decision but a failure on counsel's part to defend his client and to communicate crucial information. Counsel told petitioner "we would not have to recite exactly what happened on the record in open court if we stipulated to a factual basis

People v. Spurlin, (1984) 156 Cal.App.3d.119, 126; Cal.Rptr. 663; Provocation sufficient to arouse the heat of passion required for voluntary manslaughter may be a single event, a series of events or prolonged conduct that leads to such a state. The victim told him she wanted only him, led him to leave his wife of seventeen years, but after he moved in with her, without his knowledge, she resumed her previous lifestyle. People v. Berry, (1976) 18 C.3d 509, 515; 134 Cal.Rptr. 415, 418 and In the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion. quoting from: People v. Logan, (1917) 175 Cal. 45, 48-49[164 p.1121] as a correct statement of law. People v. Valentine, (1946) 28 C.2d 121, 139: The fundamental of the inquiry is whether or not the Defendant's reason was, at the time of his act, so disturbed or obscured by some passion to such an extent as would render ordinary men of average disposition liable to act rashly or without due

deliberation and reflection, and from this passion rather than from judgment (n.4)

The Third District Court of Appeal in People v. Cameron, supra, 30 Cal.App.4th at p. 591, held that: As to the partial defense that defendant lacked intent to kill and the act occurred in the heat of passion, evidence of intoxication is cognizable. This defense requires provocation capable of arousing sufficient passion. Provocation was present in the actions of the victim on that night. Jealousy, arouses sufficient passion. The cause of this passion and jealousy was undisputed by the police reports and show that petitioner's counsel was deficient. He disregarded all this information and left off an offer to voluntary manslaughter. That deficiency resulted in the loss of a defense to the charge of second degree murder. Petitioner has satisfied the criteria of Pope, supra, Strickland, supra, and Hill, supra.

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DENYING PETITIONER'S CLAIM THAT HIS APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Petitioner was appointed an appellate attorney, Paul Carroll, on February 18, 1994 under the supervision of Florence Hoffman, a staff attorney for CCAP. Counsel was advised by Mrs. Hoffman to "federalize the breach of plea agreement.

Mr. Carroll asked for extensions of time because of a heavy case load, but the court of Appeal stated February 23, 1994, "Extensions of time for filing briefs may be denied unless supported by a detailed, factual showing of unusual circumstances. On December 15, 1994 Mrs. Hoffman sent Counsel a packet regarding filing a federal petition. On September 29, 1994 Counsel stated that the court had denied his appeal. "I do not intend to petition the court of appeal to reconsider its opinion." When asked why he did not raise the issues in the current writ, he replied that he felt they were frivolous. Anders v. State of California, 386 U.S. 738 (1967), petitioner's counsel withdrew from his case and failed to assist successor counsel.

The Panel Attorney Manual outlines the responsibilities of an assigned attorney. These are 1) to ensure a complete appellate record, present arguable grounds for reversal or modification of judgment in favor of the client. 2) Also, where evidence outside of the record exists that would justify relief, necessary ancillary proceedings such as a petition for writ of habeas corpus should be pursued.

On February 25, 1994, counsel was advised that petitioner's original claim could only be reached by habeas petition. "Your client claims that he was coerced into taking the plea by his defense counsel. He states that the DA had initially offered a plea to voluntary manslaughter and that defense counsel told him to hang on and later told him he would not defend him unless he pleaded to 2nd degree murder. Even though a certificate of probable cause was issued, I think the only way this issue can be reached is by way of habeas petition."

Counsel petitioned the Supreme Court of California for review and was denied January 4, 1995. Counsel advised

that the next step was to file a habeas petition in the federal court. This was not accurate, the state court must first be exhausted when issues outside the record are addressed. After asking counsel to continue the case and counsel's direction that he could not do any further work, petitioner sought another attorney. Petitioner wrote and asked Counsel to send his entire file and all things pertaining to his case to his wife on May 3, 1995. Petitioner hired another attorney on July 3, 1995 and a State habeas petition was started.

March 7, 1996 petitioner received the letter from counsel stating his case in the California courts was through and that he was sending his file. Counsel never requested an expanded appointment to do a habeas petition at the state level, which is the proper avenue to exhaust the state remedies on issues outside the record. Counsel delayed in communicating with the successor counsel and petitioner, thereby greatly harming petitioner's case.

Counsel stated he felt that the court of Appeal would not reconsider its finding. The Third District Court held that even though Bunnell error had occurred, petitioner had waived his right to show it. Counsel knew that petitioner desired to pursue the case. Counsel had been directed that a federal habeas petition should be filed. Petitioner had requested his entire file be sent to his wife so that he may pursue his case with another attorney in May of 1995. Petitioner finally received the necessary entire file in July of 1998. Petitioner could not proceed with this petition without the entire file and thus was delayed. Petitioner asserts that this failure to raise these claims, as well as to provide Petitioner with his file amounts to ineffective assistance of appellate counsel. Furthermore, Petitioner asserts that he was prejudiced by this ineffective assistance because, had

appellate counsel raised all meritorious claims, it was highly probable that Petitioner's conviction would have been reversed on appeal. Therefore, Petitioner asserts that he has shown that he did, in fact, receive ineffective assistance of appellate counsel and that he was actually prejudiced by this ineffective assistance.

CONCLUSION

Petitioner respectfully requests this Court find that Petitioner has made a substantial showing of the denial of his constitutional rights. Petitioner requests this Court reverse the Judgment of the Court of Appeal to deny the request for a certificate of appealability and provide Petitioner the opportunity for federal court review on the merits of his claims.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeal for the Ninth Circuit in denying the petitioner's request for a Certificate of Appealability.

DATED:

Feb 9, 2004

By: Richard Dangler

RICHARD DANGLER
Counsel of Record

APPENDIX

A United States Court of Appeals for the Ninth Circuit-Order

B United States District Court for the Eastern District of California – Order

C Findings and Recommendations

Appendix A

FILED
SEPTEMEBER 26, 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

BOBBY GENE HUNTER,
Petitioner- Appellant,
VS.

GLENN A. MUELLER, Warden, et. al.
Respondents-Appellees

No. 03-16044

D.C. No. CV-99-01544-EJG
(Eastern California)
Sacramento

ORDER

Before: B. FLETCHER and SILVERMAN, Circuit Judges.

The request for a certificate of appealability is denied. *See* U.S.C. section 2253(c)(2).

Appendix B

FILED
MAY 23, 2003
CLERK, US DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBY GENE HUNTER,

No. CIV S-99-1544 EJG JFM P

Petitioner- Appellant,

VS.

GLENN A. MUELLER, Warden, et. al.
Respondents-Appellees

ORDER

Petitioner, a state prisoner proceeding through counsel, has timely filed a notice of appeal of this court's March 18, 2003 denial of his application for a writ of habeas corpus together with a request for a certificate of appealability pursuant to 28 U.S.C. section 2253(c).

A certificate of appealability may issue under 28 U.S.C. section 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. section 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the

required showing or must state reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

For the reasons set forth in the magistrate judge's February 6, 2003 finding and recommendations, petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should not issue in this action.

In accordance with the above, IT IS HEREBY ORDERED that petitioner's April 8, 2003 request for a certificate of appealability is denied.

DATED: May 22, 2003

"s/ Edward J. Garcia"
UNITED STATES DISTRICT JUDGE

Appendix C

FILED
FEB – 6 2003
CLERK U.S. DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBY GENE HUNTER,
PETITIONER, No. CIV S-99-1544 EJG JFM P

VS.

GLENN A. MUELLER, ET AL.
RESPONDENTS

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. section 2254. Petitioner challenges his 1993 conviction, entered pursuant to a plea of no contest, for second degree murder. Petitioner claims that (1) his no contest plea was entered in violation of several of his constitutional rights; and (2) he received constitutionally ineffective assistance of both trial and appellate counsel.

FACTS[1]

> Oroville police officers were dispatched to Josephine Schain's residence in response to a call of domestic abuse. When they arrived they saw the petitioner through a winow. He was sitting atop Ms. Schain and hitting her with his fists, repeating "tell the truth." Petitioner answered the door when the officers knocked. He looked tired, was sweating heavily, and had a strong odor of alcohol. Ms Schain had numerous contusions and obvious swelling to her head. She was taken to a hospital and died a few days later from the beating she received.

(People v. Hunter, slip op. at 2.)

PROCEDURAL BACKGROUND

On August 10, 1993, a felony complaint was filed in the Municipal Court in Butte County, charging petitioner with murder in the death of Josephine Schain. On October 14, 1993, a preliminary hearing was held in Butte County Superior Court. Subsequently, on October 21, 1993, an information was filed in Butte County Superior Court charging petitioner with one count of murder. Trial was set for December 1993. On December 1, 1993, petitioner entered a negotiated plea of no contest to one count of second degree murder. On

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[1] The facts are taken from the opinion of the California Court of Appeal for the Third Appellate District in People v.Hunter, No. C0147582 (Sep. 23, 1994), appended as Exhibit 3 to Respondents' Answer, filed September 15, 2000.

January 5, 1994, petitioner was sentenced to fifteen years to life in prison, a $10,000.00 fine, and lifetime parole.

Petitioner appealed his conviction and sentence to the California Court of Appeal for the Third Appellate District. On direct appeal, petitioner contended that (1) the lifetime parole term violated his plea bargain; (2) his lawyer was ineffective for failing to object to the life parole term; (3) the court erred in denying probation based on a finding that petitioner was a danger to others; and (4) the court erred in failing to determine petitioner's ability to pay the restitution fine. By order filed September 23, 1994, the state court of appeal affirmed petitioner's conviction and sentence, and on January 4, 1995, the California Supreme Court denied review.

On October 9, 1996, petitioner filed a petition for writ of habeas corpus in the Butte County Superior Court raising, inter alia, the claims raised in the instant petition. On July 3, 1997, the superior court conducted an evidentiary hearing, and on July 14, 1997, the court denied the petition. (Petitioner's Exhibits I3 and J3.) Thereafter, petitions for writ of habeas corpus were filed in, and denied by, the California Court of Appeal for the Third Appellate District and the California Supreme Court. Both courts denied the petitions in orders that contained no statement of reasons. (Respondents' Exhibit 7, at ii; Respondents' Exhibit 8.)

ANALYSIS

1. General Standards

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
28 U.S.C. section 2254(d)
"A state court decision is 'contrary to' [clearly established United States Supreme Court] precedents if it 'applies a rule that contradicts the governing law set forth in [United States Supreme Court] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme] Court and nevertheless arrives at a result different from [United States Supreme court] precedent.'" Early v. Packer __U.S.__, 123 S.Ct. 362, 365 (U.S. Nov. 4, 2002) quoting Williams v. Taylor, 529 U.S. 362, 405-406, 120 S. Ct. 1495 (2000)).

A state court decision involves an "unreasonable application" of federal law "when the state court's application of clearly established federal law is 'objectively unreasonable.'" Shackelford v. Hubbard, 234 F. 3d 1072, 1077 (9th Cir. 2000) citing Williams, 120 S.Ct. at 1521). A state court's application of federal law is objectively unreasonable when it is "clearly erroneous," that is, where the federal court is "left 'with a "firm conviction" that one answer, the one rejected by the state court, was correct and the other, the application of the federal law that the state court adopted was erroneous....'" Shackelford, id (quoting Van Tran, 212 F. 3d at 1152-54.

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F. 3d 911, 918 (9th Cir. 2002). Where there is no reasoned state court decision

rejecting a claim, "an independent review of the record is required to determine whether" habeas corpus relief under 2254(d). Delgado v. Lewis, 223 F. 3d 976, 982 (9th Cir. 2000).

II. Petitioner's Claims

A. Validity of Petitioner's No Contest Plea

Petitioner's first claim for relief is that his no contest plea was constitutionally invalid because (1) he was not advised of either the true nature of the charges to which he was pleading guilty nor the consequences of his plea; (2) he was not competent to enter the plea because he was being treated for major depression; and (3) the trial court failed to ensure that petitioner understood the charges against him and to advise petitioner of his rights.

A guilty plea to criminal charges must be knowing, intelligent and voluntary. Brady v. United States, 397 U.S. 742, 748 (1970).[2] In relevant part, in order for a plea to be voluntary, the record must contain proof that petitioner received "real notice of the true nature of the charge against him,'" Henderson v. Morgan, 426 U.S. 637, 645 (1975) (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)), or that he in fact understood the charged. Henderson, at 645 n. 13. The record must also reflect petitioner's awareness "of the direct consequences of [the] plea. Torrey v. Estelle, 842 F. 2d 234, 235 (9th Cir. 1988) emphasis

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[2] Under California law, a plea of nolo contedere has the same effect as a plea of guilty. See, e.g., People v. West, 3 Cal. 3d 595 (1970). Accordingly, federal constitutional principles governing guilty pleas apply to petitioner's claims in the instant case. Miller v. McCarthy, 607 F. 2d 854, 856 (1979).

added to original); see also Brady v. United States, 397 U.S. 742, 755, 90 S. Ct. 1463, 25 Le. Ed. 2d 747 (1970). The record must also reflect knowing and intelligent waiver of the constitutional protections enumerated in Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). Finally, due process requires that the defendant be competent at the time the plea is entered. See Miles v. Stainer, 108 F. 3d 1109, 1112 (9th Cir. 1997.) "When analyzing competence to plead guilty, [the courts] look to whether a defendant has 'the ability to make a reasoned choice among the alternatives presented to him.'" Id. (quoting Chavez v. United States, 656 F. 2d 512, 518 (9th Cir. 1981.)

"The voluntariness of [petitioner's no contest] plea can be determined only by considering all of the relevant circumstances surrounding it." Brady, 397 U.S. at 749. In Blackledge v. Allison, 431 U.S. 63 (1977), the Supreme Court addressed the presumption of verity to be given the plea proceeding record when the plea is subsequently challenged in a collateral proceeding. While noting that the defendant's representations at the time of his plea are not "invariably insurmountable" when challenging the voluntariness of his plea, the Court stated that, nonetheless, the defendant's representations, as well as any findings made by the judge accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of varity." Id. at 74.

Petitioner's first contention is that he was never informed that intent to kill was an element of the charge of second degree murder and that he would not have entered the plea had he known he was admitting an intent to kill the victim. The transcript of proceedings from the entry of petitioner's no contest plea contains the following exchange between

the trial court, petitioner, and petitioner's counsel, Leo Battle:

THE COURT: All right, this is action CM 3294. The defendant is charged in the information with open count of murder, and there is going to be a stipulation it will be designated murder in the second degree, is that correct?

MR. BATTLE: That is affirmative.

THE COURT: As amended, does your client waive formal advisement of rights, formal arraignment and further reading of information?

MR. BATTLE: Yes.

THE COURT: Mr. Hunter, how old are you?

MR. HUNTER: 39.

THE COURT: How far have you gone through school?

MR. HUNTER: I quit in the tenth grade.

THE COURT: You do read and write the English language though, is that correct?

MR. HUNTER: Yes, sir.

THE COURT: Did you read and understand the plea form prior to initialing it then ultimately signing it?

MR. HUNTER: Yes sir.

THE COURT: Now you have heard that the negotiated settlement is basically this will be designated as second degree murder.
Is that your understanding of the negotiated settlement?

MR. HUNTER: Yes sir.

THE COURT: All right, other than what is contained in the negotiated settlement, has anyone made any promises or representations to you of lesser sentence, probation, reward, immunity or any other advantage for you or anyone else in order to get you to enter this plea?

MR. HUNTER: No sir.

THE COURT: Are counsel aware of any other promises or representations made to the defendant?

MR. BATTLE: No.

THE COURT: Mr. Hunter, are you presently under the influence of alcohol or any drug or narcotic or prescription medication.

MR. HUNTER: No sir.

THE COURT: All right, Mr. Battle, have you explained to your client what the prosecution must prove in order for him to be found guilty of the charges to which he is pleading no contest?

MR. BATTLE: Yes.

THE COURT: Mr. Hunter, do you have any questions regarding the negotiated disposition?

MR. HUNTER: No sir.

THE COURT: Have you had enough time to talk to Mr. Battle about this matter?

MR. HUNTER: Yes, sir.

(Court Reporter's Transcript on Appeal (CRT), Volume 1 of 1, at 2-4.) The transcript shows that petitioner's counsel represented to the court that he had explained the charges to petitioner. Petitioner's counsel also signed a statement that, inter alia, he explained the charges to petitioner. (Clerk's Transcript on Appeal (CT), at 40.) The attorney's statement accompanied petitioner's written declaration and waiver of rights completed and signed in connection with entry of his no contest plea. (CT at 37-40.)

Here, as in his state habeas petitions, petitioner contends that none of the explanations he received included information that second degree murder requires an intent to kill.[3] At the evidentiary

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[3] Under California law, the elements of second degree murder are: (1) an unlawful killing: (2) accomplished with malice aforethought, whether express or implied. (People v. Malfavon, 102 Cal. App. 4th 727, 735 (2002) (citing People v. Swain (1996) 12 Cal. 4th 593, 600). Under an implied malice theory of second degree murder, no showing of intent to kill is required. See Swain, at 603 (quoting CALJIC No. 8.31.) "[U]nder an implied malice theory of second degree murder, the requisite mental state for murder-malice aforethought – is by definition 'implied,' as a matter of law, from the specific intent to do some act dangerous to human life *together with the circumstance that a killing has resulted from the doing of such act.*" Id. (emphasis in original.) It appears that the predicate of petitioner's claim – that his no contest plea necessarily constituted an admission that he intended to kill the victim – is not in accordance with California law; his plea can also be viewed as an admission that

hearing in state court, petitioner's trial counsel testified that he "went through with petitioner on several occasions the distinctions between first degree murder, second degree murder, premeditation, deliberation, malice aforethought, intent to kill, how intent to kill could be implied from an act, malice could be either express or implied." (Petitioner's Exhibit I3, at 128.) Counsel also testified that petitioner never indicated he did not understand what was being discussed. (Id. at 129.) In denying the petition, the state superior court judge specifically found Mr. Battle's testimony credible. (Petitioner's Exhibit J3, at 29.)

The state court's factual finding that petitioner's counsel did advise petitioner of the elements of second degree murder, including the required mental state, is presumed correction on this record and can only be rebutted by clear and convincing evidence to the contrary. See 28 U.S.C. section 2254(e)(1). Petitioner has failed to present evidence sufficient to rebut the presumption of correctness that attaches to this factual determination. The state court's factual determination is therefore dispositive of the first aspect of petitioner's claim that his no contest plea was involuntary. This aspect of petitioner's first claim for relief should be denied.

Petitioner also contends that he was not competent to enter a no contest plea because he was being treated with Elavil for major depression at the time he entered the plea and, therefore, that his due process rights were violated by the trial court's acceptance of the plea.

Due process requires a trial court to hold a competency hearing sua sponte whenever the

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he intended to commit an act dangerous to the victim's life and that her death resulted from that act.

evidence before it raises a reasonable doubt whether a defendant is mentally competent. Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815 (1966); Hernandez v. Ylst, 930 F. 2d 714, 716 (9th Cir. 1991); Chavez v. United States, 656 F. 2d 512, 515 (9th Cir. 1981). Competence is defined as the ability to understand the proceedings and to assist counsel in preparing a defense. Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed. 2d 824 (1960); see also Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed. 2d 321 (1993). When analyzing competence to plead guilty, we look to whether a defendant has "the ability to make a reasoned choice among the alternatives presented to him." Chavez, 656 F. 2d at 518. Even so, this standard is no higher than the Dusky standard for competence to stand trial. See Godinez, 509 U.S. at 402, 113 S.Ct. at 2688.

Whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence. Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed. 2d 103 (1975). None of these factors is determinative. Any one of them may be sufficient to raise a reasonable doubt about competence. Id.

Miles v. Stainer, 108 F. 3d 1109, 1112 (9th Cir. 1997).

The record reflects that, at the time he entered his plea petitioner, both orally and in writing, denied being under the influence of medication to the extent that his judgment was impaired. (See CRT at 4; CT at 40.) There is no evidence of any conduct by petitioner or other information that would have put

the trial court on notice that a competency hearing was required prior to the entry of the plea.

In his state habeas petition, petitioner challenged his plea on the ground, inter alia, that medication he was taking for his diagnosed depression precluded entry of a voluntary and intelligent plea. The state superior court heard testimony on this issue at the evidentiary hearing conducted on the petition and specifically found after hearing that petitioner "was not under the influence of Elavil to the extent that it would interfere with his ability to make a knowingly [sic], voluntarily [sic], and intelligent plea." (Petitioner's Exhibit J3, at 29.) Petitioner has failed to demonstrate that this finding was based on an unreasonable determination of the facts, nor does this court find that the state court's rejection of this claim was based on an unreasonable application of clearly established federal law.

Petitioner did not squarely allege that he was incompetent at the time he entered his plea and entitled therefore to a competency hearing prior to entry of the plea until the petition for writ of habeas corpus that he filed in the California Supreme Court. (See Exhibit 5 and 7 to Respondent's Answer.) That petition was denied in a silent denial without an evidentiary hearing. (Exhibit 8 to Respondent's Answer.) However, petitioner relied on the same factual predicate to support this contention as he did to support his more general challenge to the voluntariness of his plea: he contends that his mental state and the Elavil prescribed therefore rendered him incompetent to enter a plea. The state superior court's factual findings are presumed correct on the question of whether the medication rendered petitioner incapable of making a voluntary choice

among the options available to him, and petitioner has failed to present persuasive evidence to the contrary.[4]

Finally, petitioner claims that the trial court failed to ensure that petitioner understood the charges against him and failed to advise him of his rights. This claim is, in essence, a reiteration of petitioner's contentions that he did not understand the charges against him and that his no contest plea was rendered involuntary by the medication he was taking and by his mental state at the time he entered the plea. Those contentions should be rejected for the reasons discussed, supra.

To the extent that petitioner asserts simply that the trial court did not obtain an oral waiver of rights from petitioner and that the trial court failed to advise him of the charges against him, the contention is without merit. The oral colloquy set forth supra adequately demonstrates that petitioner received notice of the charges against him prior to entry of the plea. In addition, as noted above, prior to entering his plea, petitioner completed and signed a written declaration and waiver of rights in connection with the entry of his plea. (CT at 37-40.) Included in the written waiver was a list of constitutional rights given up by entry of the plea. (Id. at 38.) Petitioner's initials by each right listed indicate both his understanding of the right and his waiver thereof.

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[4] Petitioner contends that at the evidentiary hearing the state superior court improperly put the burden of proving incompetence on him and that in fact the state was required to prove that he was competent. As a threshold matter, the court notes that the principal witness on whom the state superior court relied in making its finding was the jail psychiatrist, Dr. Fithian, who was called by petitioner as a witness at the evidentiary hearing. (See Petitioner's Exhibit I-3.) In any event, the court needn't address the question of whether the burden of proof was properly allocated because the factual findings are plainly supported by the evidentiary record.

(Id.) Where, as here, the record otherwise discloses the voluntary and intelligent nature of petitioner's no contest plea, the written waiver is sufficient to satisfy the requirements of Boykin v. Alabama, 395 U.S. 238 (1969). See Rodriguez v. Ricketts, 798 F. 2d 1250, 1254 (9th Cir. 1986.) (citations omitted) ("Boykin does not require the state court to enumerate all of the rights a defendant waives as long as the record indicates that the plea was entered voluntarily and understandingly.")

For all of the foregoing reasons, petitioner's first claim for relief should be denied.

B. Ineffective Assistance of Trial Counsel.

The two-part Strickland test applies to claims of ineffective assistance of counsel in the context of convictions obtained pursuant to a guilty plea. See Hill v. Lockhart, 474 U.S. 52 (1985).

Petitioner's first contention is that his trial attorney failed to pursue an offer from the district attorney allowing petitioner to plead guilty to voluntary manslaughter. There is no evidence that such an offer was ever made. The only evidence to support this contention is petitioner's own description of a written communication to him from his attorney at the end of his preliminary hearing, from which petitioner inferred that such an offer had been made. (See Petitioner's Exhibit A, Declaration of Bobby Gene Hunter.) At the state court evidentiary hearing, petitioner's trial counsel testified that he worked unsuccessfully to try to get such an offer for petitioner. (See Petitioner's Exhibit I-3 at 147.) Petitioner's evidentiary hearing testimony mirrored that contained in his declaration, but on cross-examination petitioner admitted that he had never

heard the offer directly from the district attorney. (Id. at 203.)

This court find that the evidence is insufficient to support petitioner's claim that such an offer was made or that counsel was ineffective in his efforts to obtain such a plea deal for petitioner.

Petitioner's second contention is that his counsel was ineffective in failing to investigate his mental state or to seek a diagnostic evaluation after indicating on the change of plea form that one could be requested. Petitioner also contends that his counsel was ineffective for failing to investigate the effects on petitioner of the medication he was taking at the time he entered his plea. For the reasons set forth in section I, supra, neither petitioner's mental state nor the prescribed medication rendered his plea involuntary. Petitioner has made no showing that the outcome of the proceedings would have been different had counsel investigate his mental state or the medication prescribed therefore, or requested a diagnostic evaluation.

Petitioner's third contention is that counsel knew petitioner's Miranda rights had been violated. Petitioner offers no substantive description of the nature of the Miranda violation nor any explanation of how counsel's performance might have been ineffective in connection with any such alleged violation.

Petitioner's fourth contention is that counsel was ineffective in failing to explain to him that one of the consequences of his plea would be lifetime parole. The written waiver signed by petitioner states that the maximum sentence he would receive was fifteen years to life in prison and 36 months parole. (CT at 38.) Following the state evidentiary hearing and rejected this claim of ineffective assistance of counsel. (Petitioner's Exhibit J-3 at 30.) Petitioner

has failed to present evidence sufficient to rebut the presumption of correctness that attaches to the state court's factual finding.[5]

Petitioner also contends that counsel was ineffective in advising him to plead guilty to second degree murder when petitioner had several viable defenses to the charges he was facing. Petitioner had not demonstrated that counsel's advise to take the plea offer was, under the circumstances, outside the bounds of reasonable professional assistance.

Petitioner also contends that his trial counsel failed to review the pre-sentence report with petitioner to correct errors allegedly contained therein. Petitioner apparently contends that this led to the denial of probation because the parties stipulated that the factual basis for the plea was in the probation report and the police reports. Petitioner has failed to establish that review by counsel would have led to the correction of any alleged errors in a way that would have changed the outcome of his prison sentence.

For all of the foregoing reasons, petitioner's claim of ineffective assistance of counsel should be denied.

C. Henderson/Bigman Error

Petitioner's third claim for relief is a reiteration of his claim that his no contest plea is invalid because he was unaware of the nature of the intent element of the crime of second degree murder.

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[5] Petitioner also claims trial court error in allowing him to sign the form without advising him correctly about the life parole term. Petitioner was advised by the trial court that his maximum possible punishment was life in prison, and he was correctly advised by his attorney about the life parole term. Under these circumstances, the trial court's failure to correct the error in the written waiver form does not entitle petitioner to federal habeas corpus relief.

Although he characterizes this claim as one of Henderson/Bigman error[6], it is essentially the same contention as that raised in his first claim for relief. See Section IIA, supra. For the reasons set forth in that section, the claim should be denied.

D. Ineffective Assistance of Appellate Counsel

Petitioner's fourth claim for relief is that he received ineffective assistance of appellate counsel when his first appellate counsel failed to raise several issues in a petition for writ of habeas corpus and caused his pursuit of federal habeas relief to be delayed. Petitioner has failed to show any prejudice from the alleged omissions. This claim should be denied.

E. The Trial Court Abuse of Discretion in Denying State Habeas Petition.

Petitioner's final claim is that he state trial court abused its discretion in denying his state habeas petition. While petitioner is free to contend that the state court erred in its application of clearly established federal law with respect to any habeas claims raised in state court, a contention that the state court erred in denying a state habeas petition is not, by itself, grounds for federal habeas corpus relief. To the extent that this claim reiterates arguments raised in petitioner's other claims for relief it should, for the reasons set forth supra, be denied.

For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

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[6] Henderson v. Morgan, 426 U.S. 637 (1976); United States v. Bigman, 906 F. 2d 392 (9th Cir. 1990.)

These findings and recommendations are submitted to the United States District Judge assigned to this case, pursuant to the provision of 28 U.S.C. section 636(b)(1).

"s/ Magistrate Judge John F. Moulds."